No. 15348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

PETITION FOR REHEARING.

ROBERT W. WALKER,
121 East Sixth Street,
Los Angeles 14, California,

LOUIS M. WELSH,
510 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

No. 15348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

PETITION FOR REHEARING.

To the Honorable the Chief Judge and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, The Atchison, Topeka and Santa Fe Railway Company, hereby petitions for a rehearing *en banc* in the above-entitled matter, upon the following grounds:

(1) The Opinion and Decision of this Honorable Court neither discusses nor considers certain evidence in the record which establishes beyond question, and with clear and convincing force, that appellee misrepresented his physical condition during the trial.

(2) The Opinion and Decision of this Honorable Court fails to discuss the scope of the discretion of a trial judge when passing upon a motion under Rule 60, Federal Rules of Civil Procedure.

In compliance with Rule 23 of this Honorable Court, counsel for appellant, Louis M. Welsh, Esq., hereby certifies that in his judgment this petition is well founded, and it is not interposed for delay.

I.

Evidence Which Establishes the Misrepresentation Not Considered in the Court's Opinion.

From the Court's candid statement that it would not have reversed the granting of our motion, we conclude that this Court agrees that there is ample evidence in the record to *justify* a vacation of the judgment under Rule 60(b). The Court concluded, however, that the trial judge did not so egregiously err that an appellate court should find that he *abused* his discretion. Further, this Court holds that appellant has the burden of proving by "clear and convincing evidence" that appellee was guilty of misrepresentation. It is respectfully submitted herein that a portion of the record not discussed in the Court's opinion establishes by *clear and convincing evidence* that appellee misrepresented a material fact.

It is true, as the Court states, that "the pictures raise grave suspicion * * * but they are far from conclusive." It is also true that although Dr. Darrington Weaver's participation is "another unusual factor in the case * * *." it does not necessarily establish misrepresentation by clear and convincing evidence. The fact that Mr. Barrett was able to immediately cease his twitching after leaving counsel's office would make sanguine men more than suspicious of the validity of his claim, but it would not necessarily require the reversal of the judgment of the trial judge, who had "felt the 'climate' of the trial."

But can we escape from the conclusion that Mr. Barrett misrepresented his physical condition at the trial when his testimony therein is compared with his sworn affidavit? At the trial, Mr. Barrett testified as follows:

> "Q. *Sometimes it is not as great as others,* is that right? A. *I don't know, sir,* because I don't have no control of it; *I don't know* sometimes whether I am doing it or not doing it, *I don't know.*
>
> Q. Don't you know when you are doing it and when you are not doing it? A. *I don't pay too much attention to it; no.*" [Tr. p. 125.]

In his affidavit, Mr. Barrett stated:

> "* * * that during the trial he [affiant] testified that he was seldom free from it; *that by this, he meant* that *at times* varying from one to four hours, *he did not jerk; that during times of stress,* such as the trial, taking of deposition, seeing doctors or lawyers *the jerking is worse;*" [Tr. p. 49. Emphasis supplied.]

From his own sworn testimony it appears, clearly and convincingly, that Mr. Barrett represented at the trial that he *did not know* if his twitching was greater at some times than at other times, while in truth and in fact, as he stated in his affidavit, he *then knew* that the twitching was worse when he was under the stress of seeing doctors or lawyers. From his own sworn testimony it appears, clearly and convincingly, that Barrett represented during the trial that he *did not know* if the twitching continued at all times without interruption, because he didn't pay much attention to it, while in truth and in fact, as he stated in his affidavit, he *then knew* that he was sometimes free of the affliction from one to four hours. The Court did not refer to this evidence.

We submit that a trial judge may, within his discretion, determine if a shade of grey shall be classified as white or black, and in the absence of abuse thereof, his discretion should not be set aside by the Court of Appeals. To continue with the simile, the judge's discretion should be final *unless* he determines that "Oxford gray" is white, or "seagull gray" is black.

The effect of the motion pictures, the undercover investigation, and the complicity of Dr. Darrington Weaver fall into this "gray" area. But not so with the statements which come from the mouth of appellee. His sworn testimony and his sworn affidavit establish without question that he did not tell "the truth, the whole truth, and nothing but the truth" during the trial of this case. He misrepresented the nature and extent of his disability. This was one of the two issues contested in the litigation. The misrepresentation has been shown as a palpable fact by clear and convincing evidence out of the mouth of him who is accused of misrepresenting.

II.

The Area in Which Discretion May Operate.

This Court cites *Assman v. Fleming,* 159 F. 2d 332, 336 (C. A. 8, 1947), wherein it is stated that

> "the discretion is * * * a sound legal discretion guided by accepted legal principles * * *."

What are those principles? We have found no case which specifically articulates the criteria to be applied in passing upon motions under Rule 60. If these matters are to be reposed in the sound discretion of the trial judges, then we respectfully submit that it is the duty of the courts of appeal to articulate those "accepted legal principles" which should guide this sound discretion. We con-

tend that the discretion should operate only where the evidence concerning misrepresentation is in conflict. Where there is no conflict, as here, the decision of the trial judge should not be "canonized" under the discretion rule. The trial judge went beyond the area in which his discretion is allowed. We submit that he did so, not from malice or prejudice, but because he followed the criteria established for passing upon motions for new trial. He measured the *effect* of the misrepresentation on the verdict.

III.

Authorities Cited, but Not Applicable.

The case of *Independent Lead Mines v. Kingsbury,* 175 F. 2d 983 (C. A. 9), is not appropriate to a consideration of this case. The *Independent Lead Mines* case was an action in equity, not a motion under Rule 60. The Court there held that the fraud must be extrinsic to justify relief, whereas Rule 60 specifically provides that fraud, whether intrinsic or extrinsic, is ground for relief from a judgment. Moreover, the statement in *Toledo Scales Co. v. Computing Scales Co.,* 261 U. S. 399, 421, that the fraud charged must prevent the party complaining from making a full and fair defense, is not appropriate under Rule 60. That case was decided in 1922, long before the Federal Rules of Civil Procedure, and the case concerned fraud, not misrepresentation or other misconduct.

IV.

Conclusion.

The Federal Rules of Civil Procedure have been considered to be effective tools for the "search for truth" as opposed to a game of skill. To accomplish this noble purpose, the rules permit exhaustive pre-trial discovery. The same laudable motive to get the truth resulted in Rule 60,

which requires the strictest honesty and candor on the part of those who would use (not abuse) the Court's processes.

"Negligence" under the Federal Employers Liability Act means something different than "negligence" in an automobile accident case. But we do not have different standards of honesty for different kinds of "negligence" cases. If anything, it is more important, not less important, to demand a strict accounting of the truth from those who receive a bounty to which strict and traditional legal concepts would not entitle them. By this we mean that if railroad workers, as well as seamen, are to be "wards of the Court," then the guardian—like the parent—has some responsibility to see that the ward does not impose by dishonesty or misrepresentation. Especially is this so where the guardian is not the one who gives the bounty from his own resources.

We respectfully, we earnestly and whole-heartedly contend that Mr. Porter Barrett has himself given clear and convincing, nay, unequivocal, evidence of the fact that he did not tell the truth at the trial of this case.

Respectfully submitted,

Robert W. Walker,

Louis M. Welsh,

Attorneys for Appellant.

Certificate of Counsel.

I, Louis M. Welsh, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

Louis M. Welsh,

Attorney for Petitioner.